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Cheryl Hardy v. The Prudential Insurance Compnay of America; Wayne L. Rigby, Insurance Agent : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHERYL HARDY, Plaintiff-Appellant, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; WAYNE L. RIGBY, Insurance Agent, Defendants-Respondents.	Case No. 890483 Priority No. 5

REPLY BRIEF OF APPELLANT

APPEAL FROM INTERLOCUTORY ORDER OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, JUDGE RICHARD H. MOFFAT

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INTRODUCTORY STATEMENT

The central issue in this appeal is whether plaintiff's counsel may properly be disqualified solely for reporting to the California Bar that defendants' counsel, Richard Ferrari, was listing his name on California legal documents, with a California law firm and California address, without disclaiming membership in the California Bar. The Brief of Appellant demonstrated that the challenged report was justified, even required, by relevant law and ethical obligations; that the report caused no prejudice to defendants, the proceeding, or Mr. Ferrari; and that the report was absolutely privileged under ethical rules and the common law. Because the report had no impact on the litigants or the proceeding, Mr. Ferrari's proper recourse was to refer the matter to bar officials or to file an independent action. [1]

Plaintiff issued an open challenge to defendants in her Brief of Appellant, asserting unequivocally that no prior case in this country had upheld disqualification of counsel solely for reporting the possible ethical violation of opposing counsel, or for conduct prejudicial solely to a party's *counsel.* (Br. of App. at 12-13, 21.) The Brief of Respondents fails to cite any such case. There is none. There is no legal support whatsoever for the disqualification order in this case. [2]

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[1] Defendants repeatedly characterize the report to the California Bar as accusing Ferrari of criminal conduct and as therefore constituting "malicious defamation" or "libel" under California law. (Br. of Resp. at 17, 35-36.) They ignore the fact that the California Bar, after warning Mr. Ferrari, considered the matter "closed" (Br. of App., Add 54) In any event, if Mr. Ferrari felt accused of criminal conduct, then referral of the matter to Bar officials or commencement of an independent action would have been much more appropriate than a motion to disqualify counsel in a case unaffected by the report

[2] Defendants falsely state that "plaintiff's Brief nowhere contends that the Order was entered without any sound basis" (Br. of Resp. at 3.) To the contrary, absence of legal grounds for the order was the entire focus of plaintiff's brief (See Br. of App, Point I.A., at 12-20.)

It is understandable, then, why only one-fourth of defendants' 41-page brief is devoted to discussion of the law, usually with little or no authority. The remainder of the brief contains only a redundant manipulation of the facts, with frequent erroneous citations to the record.

There is no legally sufficient basis for disqualification on the settled facts before the Court; accordingly, the disqualification order must be reversed.

REPLY TO DEFENDANTS' STATEMENTS OF FACT

A. Defendants' Statement

The caustic, cynical, and accusatory tone of defendants' statement of facts obscures the truth and disserves the appellate process. A correction of certain misstatements of fact and identification of unsupported assertions is necessary to accurate appellate review. [3]

Most of defendants' assertions pertaining to Ferrari's procurement of the Bernstein subpoena are either unsupported or supported only by references to arguments of counsel on the motion to disqualify. For example, the assertion that Stephen Trayner obtained a commission for the Bernstein deposition is supported only by a reference to the commission itself, which does not say who obtained it. (Br. of Resp. at 10.) The assertions that Trayner sent the commission to Ferrari and that Ferrari forwarded it to the

[3] The first five pages of defendants' statement of facts (Br of Resp at 5-9) contain information that is wholly immaterial, however, correction of erroneous or incomplete information is necessary to prevent distortion of the record For example, plaintiff did not "refuse[ ] to cooperate in drafting a pretrial order" (Br of Resp at 7) Plaintiff simply did not agree with defendants' proposed pretrial order and, accordingly, submitted an alternative proposed order (See R 1479) Plaintiff is not in default on defendants' counterclaim (Br of Resp at 8) because the district court has not yet entered an order granting leave to file the proposed Third Amended Complaint Defendants must have realized that their counterclaim was premature or they certainly would have filed a default certificate Regarding the depositions of defendants' proposed witnesses (Br of Resp at 8-9), nearly half of those witnesses have depositions or affidavits already on record, several other witnesses are so minor that they need not be deposed at all, and depositions of the remaining few witnesses were being arranged when the disqualification motion was filed Contrary to defendants' assessment (Br of Resp at 9), the case was close to trial

law firm of Henderson & Angle for execution and service are supported only by a reference to Ferrari's argument at the hearing, which covers only the latter assertion. (Br. of Resp. at 10-11.) The record contains no affidavit or testimony from Trayner or anyone at Henderson & Angle. Moreover, as defendants must know, mere arguments of counsel do not constitute evidence. *See* Rule 603, Utah R. Evid.; *In re Adoption of Infant Anonymous,* 760 P.2d 916, 919 (Utah App. 1988); *People v. Kinder,* 122 Cal. App. 2d 457, 265 P.2d 24, 28 (1954). Unfortunately, these "record" references are typical of defendants' brief.

Regarding the content of the subpoena and Ferrari's supporting declaration, defendants focus on the immaterial. It is true that the declaration acknowledged Ferrari's membership in the Utah Bar, that it pertained to a Utah action, and that such declarations may be signed by out-of-state attorneys. (Br. of Resp. at 11-13.) However, the deficiency in the declaration, nowhere discussed by defendants, is Ferrari's failure to disclaim membership in the California Bar. The listing of Ferrari's name with a California law firm and California address on a California court document signed and notarized in California naturally carries the impression to the public that Ferrari is a member of the California Bar. Under the circumstances, a disclaimer of California Bar membership was necessary to render the document not misleading. (Br. of App. at 16-18.) Defendants glibly argued to the district court, and repeat in their brief, that Mr. Ferrari did nothing more nor less than what Mr. Fishler does, or what Judge Moffat has done, in procuring out-of-state subpoenas. (Br. of Resp. at 13.) The plain difference is that neither Mr. Fishler nor Judge Moffat ever procured such a subpoena by listing their name with the

name and address of an out-of-state law firm; in short, they did not create the impression that they were members of the issuing state's bar.

Defendants attempt to portray McVey's letter to the California Bar as malicious and misleading. (Br. of Resp. at 14-15.) The contrary is true. McVey sent his letter to the District Attorney of Santa Barbara County, at the direction of the California State Bar office, because that is the county in which Ferrari filed his declaration and subpoena. (McVey Aff't, Br. of App., Add. 30.) He sent a copy to the San Diego Bar Association because Ferrari was practicing out of a San Diego office. (*Id.,* Add. 39-40.) Contrary to defendants' assertion (Br. of Resp. at 14), McVey did enclose a copy of both the declaration and the subpoena with his letter. (McVey Aff't and Exhibit, Br. of App., Add. 31, 39-40.) Defendants have no sworn evidence to the contrary. Defendants then present a redundant list of information they claim McVey should have included in his letter. (Br. of Resp. at 15-16.) However, defendants purposely miss the whole point of the letter. McVey was not challenging the validity of the subpoena, Ferrari's right to procure a subpoena, or the manner in which it was procured and issued; rather, McVey's only purpose in sending the letter was to inform the California Bar that Ferrari was filing and serving court documents which, on their face, created the false impression to the public that he was a member of the California Bar. A simple reading of the McVey letter conveys no more and no less. (Br. of App., Add. 39-40.)

Defendants misrepresent the California response to McVey's letter, citing two incorrect record references. (Br. of Resp. at 17.) Brian E. Hill, Deputy District Attorney of Santa Barbara County, initially wrote to Mr. McVey that Ferrari had refuted any

impropriety. (Br. of App., Add. 41.) However, that initial response was based on false statements by Ferrari that are detailed in Brief of Appellant, pages 6-7, including his false claim that the subpoena was issued pursuant to a filed commission signed by Judge Moffat. Hill subsequently wrote the following warning to Ferrari:

> The State Bar indicates that your use of letterhead for a law office in California might lead some to believe you are licensed to practice in California. Although that proposition is arguable, it is not without some merit. The Bar referred me to Rule 1-400(d) of the California Rules of Court, to which I refer you. [Br. of App., Add. 54.]

Hill then informed Ferrari that he considered the matter closed. (*Id.*) Accordingly, McVey's report was considered to be well grounded. No further support from other California Bar officials was necessary.

Defendants struggle in the attempt to identify some factual basis for the disqualification. The sole basis mentioned in the motion to disqualify was McVey's letter to the California Bar stating that Ferrari "may be engaging in the unauthorized practice of law in California." (Motion, Br. of App., Add. 57; McVey letter, *id.*, Add. 39.) Moreover, McVey's letter was the sole factual basis discussed in the arguments before Judge Moffat. Judge Moffat considered the letter improper because he misperceived its purpose. He thought that plaintiff's counsel were challenging the validity of the subpoena, which would have been a wasted action in view of the fact that Bernstein and his unprivileged documents had already been produced. [4] In fact, the sole purpose of the

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[4] The Court: Allright. Now, is it true that in fact the deposition had been taken without the benefit of the subpoena?
Mr. Burbidge: We agreed to it.
The Court: Then why all the fuss?
Mr. Burbidge: In what context, Your Honor?
The Court: About the validity of the issuance of the subpoena?
(Cont.)

McVey letter was to inform the California Bar that Ferrari's California court documents created the false impression that he was licensed in California. When plaintiff's counsel attempted to explain that limited purpose, Judge Moffat responded that McVey had no obligation to report Ferrari's practice to the California Bar, and that no lawyer should take that kind of action, regardless of whether it is ethically required or even requested by the bar. (Tr. 10/13/89 at 33-34.) On that faulty basis, Judge Moffat ordered disqualification. (*Id.* at 35.)

Realizing the inadequate factual basis for disqualification, defendants now seek to expand the grounds beyond those considered by Judge Moffat. Defendants now claim that disqualification was ordered because Brinton Burbidge filed an "intentionally untrue affidavit" *after* disqualification was ordered on October 13, 1989. (Br. of Resp. at 17-19, n.2.) At the October 13 hearing, Mr. Burbidge informed the Court that McVey sent the letter to the California Bar on his own initiative, at the request of the California Bar. (Tr. 10/13/89 at 13-14.) Mr. McVey's affidavit confirmed that fact. (Br. of App., Add. 33-34.) After disqualification was ordered, in support of a motion for reconsideration, Mr. Burbidge submitted an affidavit, dated October 24, 1989, explaining that he was not aware of McVey's proposed letter and that the letter was unrelated to the merits of this case. (R. 2776.) Mr. Ferrari responded with an affidavit, dated October 27, 1989, asserting his opinion that Mr. Burbidge did know of the proposed letter. (R. 2822.) Defendants now

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. . . .

The Court . . . All your contacts were made for the purpose of determining whether or not the subpoena was properly issued. . . .

. . . .

The Court: And then you continued to press forward with this issue, after the question that you were trying to solve directly was really of no importance . . . . [Tr. 10/13/89 at 16-17]

accuse Mr. Burbidge of lying in his affidavit because he did not file a second affidavit disputing Ferrari's affidavit. (Br. of Resp. at 18-19.)

Defendants' whole line of argument is absurd. It is immaterial whether Burbidge knew or approved of McVey's action. Judge Moffat's ruling did not turn on that factual issue; Burbidge's affidavit is nowhere mentioned in either hearing before Judge Moffat. In fact, Judge Moffat, at Mr. Fishler's prompting, declared that motions to reconsider do not exist under Utah law; that he "made the decision based upon what was before me at the time" of the October 13 hearing; and that he would not reconsider his decision. (Tr. 10/30/89 at 4.) Accordingly, no post-ruling affidavits were considered by Judge Moffat. Defendants are simply slinging mud in a desperate effort to defend and indefensible ruling. [5]

On pages 20-22 of their brief, defendants again repeat over and over the supposed factual grounds for disqualification. Each supposed ground having been addressed previously, a mere summary response will suffice at this point.

1. Finding that McVey's letter was "unfounded": This "finding" has no support in the record and must, accordingly, be reversed. As demonstrated above and in the Brief of Appellant, pages 16-20, Ferrari's California legal documents created the false impression that he was a member of the California Bar; McVey had an obligation to report that fact;

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[5] Defendants quote Judge Moffat out of context in attempting to expand the scope of his ruling. (Br. of Resp. at 18 n.2.) When Judge Moffat made the scholarly comment, "that doesn't cut any mustard with me. I just don't buy that," he was responding to Mr. Burbidge's argument that McVey was justified in following the direction of the California Bar, not to Burbidge's unrelated denial that he knew of the letter in advance. (*See* Tr. 10/13/89 at 20.)

Defendants also attempt to characterize Burbidge's settlement overture, following disqualification, as a basis for disciplinary action. (Br. of Resp. at 17, 19.) However, again, this action was taken *after* disqualification and was nowhere mentioned by Judge Moffat as a basis for his ruling. In any event, what is so sinister in trying to settle the case? It is defendants who should be ashamed of scuttling all efforts at settlement.

and California Bar officials concluded that his report was "not without some merit." Moreover, under the common law rule of absolute privilege, Brief of Appellant at 26-29, the truth or falsity of a report of lawyer misconduct is immaterial. Judge Moffat's ruling that a lawyer has no obligation to report perceived misconduct by other lawyers, even when requested by bar officials, is patently erroneous as a matter of law.

2. Judge Moffat's speculation of improper motives for the McVey letter: The only evidence of Mr. McVey's motive is contained in his affidavit, which states that he sent the letter out of a genuine sense of obligation as a member of the California Bar. There is no evidence or finding to the contrary. There is no conceivable benefit that could have accrued to plaintiff as a result of the letter, and neither Judge Moffat nor defendants have cited any. Judge Moffat erroneously attributed a bad motive to McVey because he misperceived the letter as a belated challenge to the subpoena rather than as a valid report of apparent unauthorized practice. Defendants' suppositions about what Judge Moffat may have thought about Mr. Burbidge's affidavit and settlement overture are immaterial, as discussed above.

3. Loss of credibility of plaintiff's counsel: Judge Moffat never stated or found that he did not believe plaintiff's counsel; he simply disagreed that the facts as presented justified McVey's action as a matter of law. Again, defendants' repeated attacks on Mr. Burbidge's credibility prove nothing but mean-spiritedness because Judge Moffat's ruling was not based on Burbidge's affidavit.

4. Lack of remorse by plaintiff's counsel: This argument really stretches the imagination. Nothing in the transcript or the order indicates that Judge Moffat

disqualified plaintiff's counsel for their "lack of remorse" about the McVey letter. Moreover, Mr. Burbidge never "shouted" in the argument. He merely expressed frustration over the irony of his firm being accused of misconduct for reporting the misconduct of opposing counsel. It is Mr. Ferrari who should admit wrongdoing in masquerading as a member of the California Bar while procuring a subpoena without a properly filed commission.

5. Court's opinion that the case could be concluded more quickly with new counsel: Again, this was not a basis for the ruling. If it was, then defendants' counsel should also be removed so the case could be settled doubly quick. If trial judges were free to remove any counsel in the belief that other counsel could handle the case better or faster, the long cherished right to counsel of one's choice would be lost.

B. Response to Plaintiff's Statement

Next, defendants attempt to discredit plaintiff's statement of facts. Most of their distinctions, however, are either discussed above, immaterial or misrepresented. For example, defendants challenge the accuracy of plaintiff's cited support for Prudential's harassment of plaintiff's expert, Burt Bernstein. (Br. of Resp. at 23, ¶2.) However, defendants omitted half the citation. (See Br. of App. at 3, n.1.) Defendants attempt to mitigate their failure to serve plaintiff with a copy of the Bernstein subpoena by referring to service of the notice of deposition. (Br. of Resp. at 23-24, ¶3.) However, service of a deposition notice does not constitute service of a subsequent subpoena. Regarding the scope of the protective order, which made it unnecessary to challenge the validity of the subpoena, the order made no provision for obtaining more documents at

a later date. (Cf. Br. of Resp. at 24, ¶5 with Protective Order, R. 2197, Br. of App., Add. 49-50.)

Defendants attempt to mitigate their failure to file a commission in the Santa Barbara County Court as a predicate to issuance of the Bernstein subpoena. They glibly assert, without any evidence whatsoever, that the commission signed ex parte by Judge Noel was "obviously" presented to the Santa Barbara Clerk but was "apparently" misfiled or not filed. (Br. of Resp. at 24 ¶7.) Defendants are "obviously" guessing, or hiding the truth that Ferrari was able to procure the subpoena without a commission by simply leading the Santa Barbara Court Clerk to believe that he was a member of the California Bar. Most likely, Mr. Ferrari chose not to use the commission when he discovered that it erroneously ordered the deposition of John Murphy, plaintiff's other California expert, instead of Burt Bernstein, as desired. (*See* Commission, R. 2575, Br of App., Add. 44-45.) Whatever the truth, Mr. Ferrari is not talking. Defendants' counsel succeeded in turning the tables at the disqualification hearing by persuading Judge Moffat that the commission had been properly filed in California, despite the facts that they had just handed him the *original*, and the Santa Barbara Clerk had certified that it was not on file. (Tr. 10/13/89 at 21; Br of App., Add. 48.) [6]

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[6] Mr. Fishler represented:

> On July 31st, 1989, a subpoena was issued out of the California Court. . . . That was done after Your Honor issued a commission, allowing for the taking of the deposition . . . . Armed with that commission, the California Court issued a subpoena, which was duly served. [Tr. 10/13/89 at 3.]

Mr. Ferrari added

> Your Honor, [the commission] was filed by the firm of Henderson and Angle in Santa Barbara [*Id* at 23]

Finally, defendants again question the Brian Hill letter, discussed above, arguing that Rule 1-400, California Rules of Professional Conduct, cited by Mr. Hill, "obviously had no possible bearing on the Bernstein subpoena." (Br. of Resp. at 25, ¶7, n.4.) The California Bar "obviously" disagree. Mr. Hill was informed by the California Bar that Ferrari's use of a California law firm and address on California legal documents "might lead some to believe [he is] licensed to practice in California." (Br. of App., Add. 54.) Rule 1-400(D), as interpreted by the California Bar, prohibits the use of any law firm name in a manner which tends to confuse or mislead the public, and requires lawyers to make any disclosure necessary to avoid misleading the public. (*See* full text of Rule, Br. of App., Add. 55-56.) Accordingly, Rule 1-400 would preclude Ferrari from procuring the Bernstein subpoena with documents that could mislead the public by creating the false impression that he is a member of the California Bar.

SUMMARY OF ARGUMENT

This case should be reviewed under a *de novo* or correction of error standard of review. The abuse of discretion standard, typically applied in lawyer discipline cases, does not apply because the challenged report to the California Bar violated no ethical rule and caused no prejudice to the parties or the proceeding. The district court did not impose disqualification to remedy any perceived prejudice, but solely to punish plaintiff's counsel for an act unrelated to the proceeding. The question presented, whether a lawyer is justified in reporting the apparent misconduct of opposing counsel, is one of law. Moreover, all evidence related to the disqualification is documentary. Accordingly, this

Court may review the evidence *de novo* and decide the case as a matter of law rather than as a matter of discretion.

Under either standard, the disqualification order must be reversed. Under the abuse of discretion standard, the test is not whether any reasonable person could rule as the district court ruled, but whether disqualification was ordered on untenable grounds or for untenable reasons. Because the order has no adequate factual or legal basis, it was an abuse of discretion. The order is erroneous as a matter of law because McVey's report to the California Bar was justified, ethically required, well founded, and absolutely privileged.

Defendants concede that McVey's letter resulted in no prejudice to the parties, and they have identified no prejudice to the proceeding. They assert merely that the letter libeled Mr. Ferrari. Under these circumstances, disqualification in an unrelated matter is inappropriate, the proper remedy being a complaint to bar officials or an independent action. Defendants have cited no case, and plaintiff has found none, disqualifying counsel solely for reporting the apparent misconduct of opposing counsel. Defendants' assertion that disqualification works no hardship on Mrs. Hardy is plainly without merit.

Defendants do not dispute that McVey's report to the California Bar is absolutely privileged under the common law. They merely challenge the corresponding privilege under the disciplinary rules. However, defendants cite no legal or policy grounds not to apply the privilege in this case. The privilege is necessary to encourage reporting of lawyer misconduct and to maintain effective self-regulation of the profession.

Finally, disqualification implicates the due process rights of both plaintiff and her counsel. Without analysis or citation of authority, defendants term plaintiff's right as "frivolous" and her counsel's right as "nonexistent." The disqualification order should be reversed, and the case should be remanded for trial on the merits.

ARGUMENT

POINT I: THE DISQUALIFICATION ORDER CONSTITUTES REVERSIBLE ERROR UNDER BOTH ABUSE OF DISCRETION AND CORRECTION OF ERROR STANDARDS OF REVIEW.

Defendants' arguments I, II, and III all pertain to whether this Court should review the disqualification order under an abuse of discretion or correction of error standard. Plaintiff has demonstrated that a *de novo* or correction of error standard of review is appropriate under the circumstances of this case. (Br. of App. at 9-12.) However, under either proposed standard, the disqualification order must be reversed.

A. Abuse of Discretion

Defendants cite *Margulies v. Upchurch,* 696 P.2d 1195 (Utah 1985), for the proposition that disqualification of counsel "may be reviewed only for abuse of discretion." (Br. of Resp. at 29.) However, *Margulies* states that a trial court's "discretion extends to deciding whether disqualification is a proper sanction [only] *after* a finding of an ethical violation." 696 P.2d at 1199 (emp. added). In the present case there was no such finding. Moreover, it is only "that portion of the trial court's order" actually imposing or withholding the sanction that may be reviewed for abuse of discretion. *Id.* at 1200. Review of predicate findings and conclusions requires no deference to the trial court,

especially where, as here, all evidence is documentary. *Id.*; *see Western Kane County Spec. Serv. Dist. v. Jackson Cattle Co.,* 744 P.2d 1376, 1378 (Utah 1987).

The definition or test for abuse of discretion urged by defendants is also faulty. They cite a federal case dealing with voluntary withdrawal of counsel for the rule that discretion is abused "only where no reasonable man could agree with the district court." (Br. of Resp. at 29.) However, no single test for abuse of discretion would apply in all cases and circumstances, and Utah apparently has never adopted the deferential standard proposed by defendants. In fact, most states have rejected it. For example, in *Coggle v. Snow,* 56 Wash. App. 499, 784 P.2d 554 (1990), the court carefully reviewed the bounds and standards for judicial discretion and rejected the "reasonable man" approach:

> Instead of examining the reasons for the decision, this standard focuses on the reasonableness of the decision-maker. But to say that an abuse of discretion exists when "no reasonable man, woman or judge" would have taken the view adopted by the trial court is not accurate. It cannot justly be said that every trial judge reversed by the appellate court or Supreme Court for an abuse of discretion is less reasonable than the reversing judges. . . . Strict application of such a standard would mean that an appellate court would never reverse without a hearing to determine the general reasonableness of the judge. [784 P.2d at 559.]

The court concluded that "[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Id.* This standard is consistent with *Margulies,* where this Court reversed an order denying disqualification, not because no reasonable person could rule as the trial court ruled, but because the basis for the ruling was untenable under the circumstances.

Applying the foregoing principles to the present case, it is evident that Judge Moffat abused his discretion. The purpose of his discretion over the conduct of counsel

is to foster justice by preventing ethical violations that prejudice the opposing party or the proceeding. He abused his discretion, not because he is unreasonable or because no reasonable person could rule as he ruled, but because his ruling is based on "untenable" grounds and reasons. In this case, as noted previously, there was no ethical violation and there was no prejudice to the parties or the proceeding. Judge Moffat misperceived the McVey letter as a belated challenge to the subpoena rather than as a dutiful disclosure to bar officials. His "finding" that the letter was "unfounded" was based on the erroneous and "untenable" view of the law that attorneys have no obligation to report apparent misconduct of other attorneys, even when expressly requested by bar officials. The reporting of apparent misconduct simply did not justify the extreme sanction of disqualification under the circumstances of this case. Accordingly, the order must be reversed.

B. Correction of Error

Defendants' objections to a correction of error standard have no merit. For example, defendants assert that this case does not involve mixed questions of fact and law. (Br. of Resp. at 30.) However, the questions whether McVey's report to the California Bar was "unfounded," whether the report was justified under the circumstances, and whether the report was privileged involve elements of both fact and law. Defendants next assert that this Court's jurisdiction over discipline of attorneys is not invoked because this is not a disciplinary matter. (*Id.* at 31.) However, where sanctions are imposed for attorney conduct unrelated to the parties or the proceeding, the sanctions cannot be considered remedial, but must be regarded as purely punitive. Finally, defendants dispute

that the disqualification motion was decided on solely documentary evidence. They regard counsel as witnesses at the disqualification hearing and treat their arguments as testimony. (*Id.*) However, as noted previously, counsel at oral argument on a motion do not speak as witnesses, and their arguments do not constitute evidence. *See In re Adoption of Infant Anonymous, supra,* 760 P.2d at 919; *People v. Kinder, supra,* 265 P.2d at 28. Accordingly, defendants present no bar to a correction of error standard of review.

Defendants argue that Judge Moffat committed no error in ordering disqualification, citing cases involving "repeated violations of an order," "wrongdoing," or "protection of the integrity of the judicial process." (Br. of Resp. at 31-32.) However, this case implicates none of the above. The McVey letter violated no order or ethical rule and did not interfere with the judicial process. Mr. McVey was simply complying with his ethical obligation to report apparent misconduct and with the request of the California Bar, of which he is a member. Since McVey did nothing to justify disqualification, Judge Moffat's order is reversible under the correction of error standard.

POINT II: THE REPORTING OF MR. FERRARI'S CONDUCT TO THE CALIFORNIA BAR WAS LAWFUL AND PROPER.

In their argument IV, defendants assert that McVey's report to the California Bar justified disqualification because his "accusations were unfounded and made to achieve an advantage in this case." (Br. of Resp. at 33.) However, as demonstrated in the Brief of Appellant, pages 19-20, 25-29, a lawyer has an ethical responsibility to report the apparent misconduct of a fellow lawyer. Such reporting, while at times distasteful, is necessary to effective self-regulation of the profession. If lawyers are to be exposed to liability or sanctions whenever such a report turns out to be "unfounded" or results in no corrective

action, then reporting of even legitimate charges will cease and self-regulation will become illusory. *See, e.g., Wiener v. Weintraub,* 22 N.Y.2d 330, 239 N.E.2d 540 (1968). Additionally, under the rule of absolute immunity, the reporting lawyer's personal motives are immaterial. *See, e.g., Bufalino v. Teller,* 209 F. Supp. 866, 870 (D. Pa. 1962). In any event, as discussed previously, the evidence shows that McVey's report was not "unfounded," as it had basis in both law and fact, and was not made for any improper purpose.

Defendants also challenge the cases cited by plaintiff, which demonstrate the impropriety of Ferrari's conduct (Br. of App. at 17-18), asserting that the cases are "miscited" and have no application to the dispute. (Br. of Resp. at 33-34.) However, defendants provide no analysis or cases to the contrary. Plaintiff reaffirms to the Court that the authorities cited provide more than ample legal basis for McVey's report to the California Bar.

Finally, defendants cite various ethical rules and statutes which they argue were "clearly" violated by McVey's letter. (Br. of Resp. at 34-36.) However, each provision was discussed and distinguished in plaintiff's Brief of Appellant, pages 15-16. The district court found no violation of any of the provisions. Accordingly, no further reply is necessary.

POINT III: CONSIDERATIONS OF RELATIVE PREJUDICE AND HARDSHIP TO THE PARTIES REQUIRE REVERSAL OF THE DISQUALIFICATION ORDER.

Defendants' arguments V, VI, and VIII discuss the considerations of prejudice and hardship to the respective parties. Plaintiff's Brief of Appellant, pages 20-23, demonstrated that McVey's report to the California Bar resulted in no prejudice to

defendants or the proceeding, or even to Mr. Ferrari. Defendants do not dispute the absence of prejudice to themselves as parties. They merely assert, in reliance on a California statute, that McVey libeled Ferrari and that damage *to Ferrari* is presumed. (Br. of Resp. at 36.) This response reveals the true objective of the disqualification motion. It was not to remedy any harm to the parties or the proceeding, but to punish plaintiff's counsel for Ferrari's personal satisfaction. Under these circumstances, disqualification is wholly inappropriate. The job of the district court is to protect the parties and the proceeding, not to take sides in personal disputes between counsel. If Ferrari feels libeled, he has a remedy by way of independent action or complaint to the bar. Disqualification of plaintiff's counsel serves no purpose but to punish Mrs. Hardy.

Regarding prejudice to the proceeding, defendants assert, without support, that the record reveals "ethical lapses" that "evidently" tainted the litigation. (Br. of Resp. at 37.) Defendants are straining. To repeat once more, Judge Moffat made no finding of an ethical violation; neither did he make any finding that the McVey letter to the California Bar "tainted" this litigation. Moreover, there is no evidence in the record to support any such finding. Supporting evidence and findings cannot be presumed. *See, e.g., Anderson v. Utah County Bd. of County Commissioners,* 589 P.2d 1214, 1216 (Utah 1979)(absence of necessary finding requires reversal); *Tester v. Tester,* 123 Ariz. 41, 597 P.2d 194, 198 (App. 1979)(absence of supporting evidence requires reversal). [7]

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[7] The district court's only comments regarding the progress of the proceeding implicated the conduct of counsel on "both sides." (Tr. 10/13/89 at 32.) The court acknowledged that "in all honesty, this has not been a one-sided matter." (Tr. 10/30/89 at 11.) In any event, "a poor professional working relationship between counsel" does not justify the sanction of disqualification. *Bodily v. Intermountain Health Care Corp.,* 649 F. Supp. 468, 472 (D. Utah 1986). Further, if a problem exists on "both sides," it is not fair to sanction only one side. The relevant point is, the act of reporting a possible ethical violation to the California Bar in no way undermines the ability of Kirton, McConkie & Poelman to continue its representation of Mrs. Hardy.

Finally, defendants argue that there is no evidence of hardship to Mrs. Hardy resulting from disqualification of her counsel. (Br. of Resp. at 38.) This argument defies reason. As demonstrated in plaintiff's Brief of Appellant, pages 24-25, and as this Court acknowledged in *Margulies, supra,* 696 P.2d at 1205, disqualification of counsel after a long period of representation certainly imposes hardship on the affected client. This Court may likewise take judicial notice of the hardship on Mrs. Hardy. *See* Rule 201, Utah R. Evid. (judicial notice of facts not subject to reasonable dispute).

POINT IV: THE RULE OF ABSOLUTE PRIVILEGE FOR REPORTS OF LAWYER MISCONDUCT APPLIES TO THE PRESENT CASE.

Plaintiff demonstrated in her Brief of Appellant, pages 25-29, that McVey's report of apparent misconduct to the California Bar is absolutely privileged under the Procedures of Discipline of the Utah State Bar and under the common law. Defendants do not dispute the common law privilege; they provide no discussion and cite no cases to challenge application of that privilege to this case. Defendants argue instead, in their argument VII, that the privilege is not authorized by Rule 8.3(a), Utah Rules of Professional Conduct. (Br. of Resp. at 37.) The only problem with that argument is that plaintiff never invoked Rule 8.3 as a basis for immunity, and defendants' citation to plaintiff's brief for such an argument is erroneous. Rule 8.3 sets forth the ethical duty to *report* lawyer misconduct; it has nothing to do with the claimed privilege. (*See* Br. of App., Add. 63.)

Next, defendants argue that the privilege is not authorized by Rule VIII(c), Procedures of Discipline of the Utah State Bar, because the rule applies only to "civil liability," and McVey lost any privilege by communicating with the Santa Barbara District

Attorney and the San Diego Bar Association. (Br. of Resp. at 37.) Defendants cite no authority for these limitations on the rule. Moreover, plaintiff has found no case limiting the immunity to "civil liability" as opposed to disqualification. Since "civil liability" is nowhere defined in the rules, its scope may reasonably extend to disqualification. The purpose for the immunity applies equally to both results; that is, to prevent retaliation of any kind for reporting of lawyer misconduct. Defendants should not be permitted to circumvent that purpose simply by seeking disqualification instead of some other form of liability. Furthermore, the intended immunity is not defeated by the other communications because Mr. McVey was following the instructions of the California Bar, and the Santa Barbara District Attorney and San Diego Bar Association were simply agents for the California Bar in investigating and preventing the apparent misconduct.

In summary, defendants have failed to demonstrate that absolute immunity, as authorized by either the disciplinary rules or the common law, should not apply.

POINT V: DISQUALIFICATION VIOLATES THE DUE PROCESS RIGHTS OF PLAINTIFF AND HER COUNSEL.

Plaintiff demonstrated in her Brief of Appellant, pages 29-34, that the disqualification order violated the procedural and substantive due process rights of both plaintiff and her counsel. In their argument IX, defendants respond only to the violation of plaintiff's rights. (Br. of Resp. at 38-41.) With regard to the rights of counsel, defendants assert elsewhere, without citation of authority, that counsel's interest "is not an appropriate issue" on appeal. (*Id.* at 1.) However, when counsel are sanctioned in the course of litigation, they acquire an independent interest on appeal for the purpose of vindicating their own rights and reputations. *See Cheng v. GAF Corp.,* 713 F.2d 886 (2nd

Cir. 1983); *In re Murphy,* 560 F.2d 326, 332-33 n.10 (8th Cir. 1977); *Dietrich Corp. v. King Resources Co.,* 596 F.2d 422, 424 (10th Cir. 1979). Accordingly, arguments on behalf of plaintiff's counsel are appropriate and must be considered.

With regard to plaintiff's substantive right to retain counsel of her own choosing, defendants simply characterize her claim as "frivolous." They do not bother to provide analysis or authority. (Br. of Resp. at 38.) On the procedural claims, defendants assert that no evidentiary hearing is required on a motion for disqualification. (*Id.* at 39.) While a hearing may not be required in every case, it should have been granted in this case, not to hear testimony only from Mrs. Hardy, but from other witnesses as well. Moreover, under the circumstances, plaintiff's request for a hearing was timely. Finally, regarding the lack of findings, plaintiff's position is not that the findings should have been "more detailed" (Br. of Resp. at 40), but that no supporting findings were possible on the evidence before the court.

CONCLUSION

Based on the foregoing, this Court should reverse the disqualification order and remand the case, again, for trial on the merits.

DATED this 17th day of October, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed this 17th day of October, 1990, four true and correct copies of the REPLY BRIEF OF APPELLANT in the United States mail, postage prepaid, to the following:

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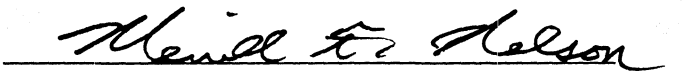

FOR THE SUPREME COURT OF UTAH

In Re: Appeal of the Determination of Board of Bar Commissioners of the Utah State Bar	Case No. 890491

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ARGUMENT PRIORITY CLASSIFICATION: 5